REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 99 OF 2011

(An appeal against both conviction and sentence of the

Senior Resident Magistrate's Court at Mumias in Criminal

Case No. 1057 of 2010 [G. O. OYUGI, RM] dated 14th June, 2011

PATRICK ATETA ANDIKA …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGEMENT

The appellant was charged before the subordinate court with defilement contrary to **Section 8 (2)** of the **Sexual Offences Act 2006**. The particulars of charge were that on the 9th October, 2010 in Mumias District within Kakamega County unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of a girl called F M, aged 5 years. In the alternative he was charged with indecent act with a child contrary to **Section 11 (1)** of the same Act. The particulars of charge were that on the same day and place, did an act of indecency with F M a child aged 5 years by touching her private parts namely vagina.

He pleaded not guilty to both counts. After a full trial, he was convicted of attempted defilement contrary to Section 9 (1) of the Sexual Offences Act and sentenced to serve 20 years imprisonment.

Being aggrieved by the decision of the trial court, he has appealed to this court against both conviction and sentence, listing 9 grounds of appeal. At the hearing of the appeal, the appellant tendered written submissions. He also highlighted the same. It was his position that the evidence of PW1 who was the complainant and PW2 her mother, was contradictory. He also complained that his wife Ruth was erroneously not called by the prosecution to testify.

The learned Prosecuting Counsel, Mr. Oroni, conceded to the appeal. In counsel's view, since there was no penetration, the learned magistrate should not have convicted for attempted defilement. Counsel also submitted that the complainant PW1 in cross-examination stated that it was the mother PW2 who told her to implicate the appellant in court. In addition, Ruth the wife of the appellant was not called by the prosecution to testify. No certificate of birth was produced in court to prove the age of the complainant. Lastly, counsel submitted that the allegation by the appellant in his sworn defence that the complainant's mother was previously his girlfriend could be true, thus this case might be a result of a broken relationship.

The evidence for the prosecution, in brief, is that on the 9th of October, 2010 PW2 F K N left her

three children D, the complainant PW1, and S at home at Ekero to go and work at a salon. When she was away, the appellant who was a neighbour persuaded the complainant PW1, a child of 5 years to accompany him into a nearby incomplete house. Upon entry, he asked her to lie down facing upwards, which she did. He then removed her panties, undressed and defiled her. He thereafter cautioned her not to tell anybody and promised to give her ugali and "omena" fish.

PW2 came back home at around midday, cooked food for the children including the complainant, but noticed nothing unusual. She went back to her work and came back in the evening and they had supper. It was in the afternoon of the next day 10/10/2010 that PW2 observed that PW1 was unwell. Though she enquired, PW1 said that she was fine. In the morning of 11/10/10 however, PW1 opened up and revealed the story that the appellant had defiled her.

After examining the complainant, PW2 informed the wife of the appellant called Ruth as well as the landlady about the incident. She then took the complainant to hospital where she was treated and a medical report and P3 form filled. The appellant in the meantime disappeared from the locality. Though a report had been made to the police, he was only arrested on 12/11/10 at Matungu market.

The Clinical Officer PW4 Isaac Mukhwana produced the P3 form and treatment notes. It was his evidence that no penetration had occurred. However, there were healed injuries on the labia majora and labia manora of the complainant. He formed the opinion that the complainant was injured by a person who assaulted her sexually but which did not amount to defilement.

When put on his defence, the appellant gave sworn testimony. He stated that he was arrested on 12/11/10 at Matungu market for alleged defilement. That he did not commit the offence. That he was pointed out by PW2 who was once his girlfriend.

Faced with the above evidence, the learned trial magistrate found that an offence of defilement had not been proved since no penetration was established. However, the learned magistrate found that there was evidence of attempted defilement. Accordingly, the appellant was convicted of attempted defilement and sentenced to serve 20 years imprisonment. Therefrom arose this appeal.

As a first appellate court, I have to start by reminding myself that I am duty bound to re-evaluate all the evidence on record and come to my own conclusion and inferences. See the case of **Okeno -vs- Republic [1972] EA 32**.

The conviction of the appellant is grounded on the evidence of identification of a minor aged 5 years, the complainant.

Though the Prosecuting Counsel submitted that the age was not proved, the evidence on record shows that exhibit 3 was produced in court to prove the age of the complainant. This was the child immunization card for F M which indicated the date of birth as 31/5/2005. This evidence by the prosecution was not controverted. The learned magistrate also physically saw the complainant in court. The complainant was so young that she did not even know the importance of an oath. I have no doubt that the complainant was of the age stated in the charge sheet.

Under **Section 124** of the Evidence Act (Cap. 80), the evidence of a minor victim of a Sexual Offence does not require corroboration to sustain a conviction, provided it is believable and is so believed on reasons to be stated by the court. The section provides -

"124. Notwithstanding the provisions of Section 19 of the Oaths

> ***and Statutory Declarations Act, where the evidence of alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth."

The complainant PW1 gave brief evidence. Being a minor, the evidence was not on oath. She was erroneously cross-examined and re-examined. When any witness or the accused person gives evidence which is not on oath, he or she cannot be cross-examined. I will therefore ignore the evidence of cross-examination and re-examination of the complainant herein.

The evidence of PW1 the complainant to be relied upon, is only the evidence in chief. The learned magistrate was of the view that the complainant was telling the truth.

The magistrate had the opportunity to observe and determine the demeanour of the young girl which this court does not have. In addition, the evidence of the mother PW2, was quite consistent with the behaviour of a young girl who was sexually assaulted and warned by the culprit not to tell anybody. On the day in question which was 9/10/2010 she did not tell anybody about the incident. Later on 10/10/2010 she said that she was feeling unwell. When pressed by PW2, she said she was fine. On 11/10/2010, following physical examination by PW2the mother, she revealed the incident.

The hospital notes showed that there were injuries to the external private parts of the complainant, though the hymen was intact. In my view, those injuries could have been caused by something other than the appellant. However, why did the appellant who admitted was a neighbour of the complainant and her mother have to disappear from the locality until he was arrested at a different place more than a month after the alleged incident? In my view, the evidence on record, the circumstances of the offence, and the conduct of the appellant clearly showed that he was the culprit.

The appellant also complained that his wife Ruth was not called by the prosecution to testify. That she was a crucial witness. I am aware that PW2 stated in her evidence that Ruth was the first person she informed about the incident. I am also aware that in the case of **Bukenya -vs- Uganda [1972] EA 549,** in which the court held that where crucial witnesses are not called by the prosecution to testify and no explanation is given for the failure to do so, the court is entitled under the rules of evidence to infer that the evidence of such witnesses would prejudicial to the prosecution case.

In the present case however, though Ruth the wife of the appellant was a competent witness for the prosecution, she was also an available witness to the defence. I rely on the provisions of **Section 127 (2)** and **(3)** of the **Evidence Act (Cap. 80)**, which provides as follows -

"***127 (2) – In criminal proceedings any person charged with an offence and the wife or husband of the person charged shall be a competent witness for the defence at every stage of the proceedings, whether that person is charged alone or jointly with any other person.***

Provided that -

i. ***the person charged shall not be called as a witness***

except upon his own application;

(ii) save as provided in (3), the wife or husband of the

person charged shall not be called as a witness

except upon the application of a person charged;

iii. ***the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.***

3. ***In criminal proceedings, the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person in any case where such person is charged -***

(a) with the offence of bigamy;

(b) with offences under the Sexual Offences Act; or

(c) in respect of an act or omission affecting the

person or property of the wife or husband of such

person or the children of either of them, or

otherwise."

Though the prosecution herein did not call the wife of the appellant to testify, the appellant had the option as a spouse to call her, if he thought that her evidence would contradict that of the prosecution. He did not do so. The prosecution had only the option to avail the spouse as its witness or not to do so. Unlike the situation in the Bukenya case (supra) **Section 172 (2) (iii)** of the Evidence Act above bars the prosecution from making any comment or give reasons for the failure to call Ruth the wife of the appellant, to testify either for the prosecution or the defence. Their silence on the same was therefore in line with the statutory law in Kenya. In my view, and in the circumstances of this case, the pronouncements in the case of **Bukenya -vs- Uganda** (supra), are not applicable to the failure by the prosecution to call Ruth as a witness.

Though the landlady to whom PW2 reported the incident, and the village elder who arrested the appellant were not called to testify, it is clear from the evidence of the appellant himself that he was arrested on the 12/11/10 for the offence of defilement. There could therefore, in my view, be no reason for the court to think that he was arrested on mistaken identity or because of a different allegation.

I appreciate that the learned Prosecuting Counsel has conceded to the appeal.

Having re-evaluated all the evidence on record however, I am of the view that the conviction of the appellant is sustainable. That the prosecution proved its case against the appellant beyond any reasonable doubt, for attempted defilement. I will uphold the conviction.

The sentence imposed is 20 years imprisonment. The minimum sentence for the offence is 10 years imprisonment. Considering that the appellant is a first offender, in my view the sentence of 20 years imprisonment is harsh and excessive. The minimum sentence of 10 years imprisonment itself shows that the offence is serious. It is not a short sentence. Doubling that minimum sentence for a first offender has no justification. I will substitute the sentence with a sentence for 10 years imprisonment.

In conclusion, I dismiss the appeal on conviction. I uphold the conviction of the trial court. I set aside the sentence imposed by the trial court. In its place, I order that the appellant will serve imprisonment for a term of ten (10) years from the date he was sentenced by the trial court. Right of appeal 14 days.

Dated and delivered at Kakamega this 8th day of May, 2014

George Dulu

J U D G E